

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
On its Own Motion)	
)	
v.)	
)	ICC Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Proceeding to review Rider 4, Gas cost, pursuant)	
To Section 9-244(c) of the Public Utilities Act)	

**MOTION FOR INTERLOCUTORY REVIEW OF
COMMISSION RULING GRANTING IN-HOUSE COUNSEL
ACCESS TO INFORMANT'S DOCUMENT**

INTRODUCTION

Pursuant to Section 200.520, and consistent with the Administrative Law Judge's directive at the hearing on July 23, 2002, the Citizens Utility Board ("CUB") and Cook County State's Attorney's Office ("CCSAO") request interlocutory review of the Administrative Law Judges ruling regarding the Protective Order sought by CUB/CCSAO. This issue involves a 14-page facsimile ("fax") sent by a Nicor employee to CUB/CCSAO on June 21, 2002, alleging Nicor submitted false testimony to the Commission in Docket No. 02-0067. The ALJ's ruling gives in-house counsel access to the protected document and will not protect the identity of the informant.

Upon receipt of the fax, CUB (later joined by CCSAO) filed a Motion to Reopen the Record and a Motion for Protective Order (June 27, 2002). CUB's Motion for Protective Order argued that in order to protect the informant, only Nicor's outside counsel should be allowed access to the fax. Nicor responded that all employees should

have access to the fax (Nicor Response at 5), or in the alternative, in-house counsel should be allowed to see the fax. Nicor Response at 9. On July 23, 2002, the Administrative Law Judge denied Nicor's request that all personnel have access to the fax, but allowed in-house counsel access to the fax.

CUB/CCSAO petition the Commission for interlocutory review because it believes that the need to protect the informant clearly outweighs Nicor's need for the document. When Nicor's in-house counsel (General Counsel Russ Strobel and Dan McNamara) review the fax, counsel will likely know the identity of the informant. The identification by in-house counsel will inexorably destroy the informant's status within the company. While Nicor correctly argues that Illinois law protects the informant from firing, no reasonable person can argue that the informant will not be ostracized and excluded from meaningful business as a result of the revelation of his or her identity. Thus, for the reasons set forth below, CUB/CCSAO request that the Commission overturn the ALJ's Order and limit Nicor access to the document to outside counsel.

ARGUMENT

1. The Commission must make a judgment weighing the protection of the informant, against the company's needs and rights to the documents. Elizabeth Dole v. Local 1942 IBEW, AFL-CIO, 870 F. 2d 368, 372 (7th Cir. 1989). CUB/CCSAO argue, in essence, that Nicor has neither a right to, nor a need to, obtain the fax. CUB made a strong showing in its Motion for Protective Order that the Commission should protect the informant. When applying the balancing test, the ALJ erred by granting Nicor's in-house counsel access to the fax.

2. Although there is no written decision on this issue, by virtue of withholding the document from unlimited distribution at Nicor, it appears that the Commission attempts to protect the informant. However, CUB/CCSAO submit that the by allowing Nicor in-house counsel access to the fax, the Commission undermines its objective.

3. In CUB's Motion for Protective Order it stressed the importance of protecting the identity of the whistleblower, to both protect this individual, and to encourage similar whistleblowers to come forward in the future. Courts have long recognized the societal interest in protecting informants in order to encourage future disclosures. Dole 870 F. 2d at 372; M v. Board of Education Ball-Chatham Community Unit School District No. 5, 77 F.R.D. 463 (S.D. ILL. 1978). Moreover, given the fact that utilities serve millions of customers, many still captive and dependent on the utility for critical services, the need to encourage utility informants to step forward to disclose wrongdoing that harms the public speaks for itself.

4. CUB/CCSAO assert that any disclosure of the document, other than the ninth page entitled "Nicor Gas Company, Gas Costs – Selected Illinois Utilities," should be protected because disclosure would likely reveal the identity of the informant. Nicor's outside counsel has now reviewed the document, and did not attempt to refute CUB/CCSAO's argument that allowing the company to see the document would compromise the informant. Therefore, the company implicitly acknowledges that the informant's identity will be compromised.

5. CUB/CCSAO, based on its own review of the document, as well as the assessment of its witness, Jerome Mierzwa, believes that only a limited number of people at Nicor would have the knowledge and access to information to provide the insight and

analysis contained in the document. This is CUB/CCSAO's assessment regarding each and every page, other than the ninth page entitled "Nicor Gas Company, Gas Costs – Selected Illinois Utilities." Moreover, the style and tone of the document may prove to be revealing in and of itself. Thus, identification of the informant by in-house counsel is highly likely.

6. CUB/CCSAO does not question the integrity of in-house counsel with respect to how they will treat the informant. The problem is that once the general counsel of the company, or any in-house counsel, knows the informant's identity, it would be impossible for anyone to ignore that knowledge when dealing with the informant in the future.

7. The company argues that in-house counsel needs access to the fax because, "Nicor cannot determine whether the information revealed in the fax is subject to an attorney-client privilege, nor can in-house counsel properly advise its clients to the claims found in the fax." Nicor Response at 8. First, Nicor fails to explain which page(s) of the document divulge attorney-client privileged information. Review of the document indicates no revelation of legal strategy and only discussion of financial information and opinion that would not be subject to attorney-client privilege. CNR Inv., Inc. v. Jefferson Trust and Sav Bank, 115 Ill. App. 3d 1071, 1074 (3rd Dist. 1983). Nicor does not allege that any attorney is named in the document in any way, and to CUB/CCSAO's knowledge none of those named are attorneys. Nor does Nicor address the issue that attorney-client privilege can be waived by voluntary disclosure of the information by the client. Suburban Sew "N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 258 (N.D. ILL. 1981).

8. Nicor further claims that in-house counsel needs to advise its clients as to the claims found in the fax. CUB/CCSAO, however, note that claims found in the fax are at this point not at issue in the proceeding. CUB brought the fax to the attention of the ALJ and the parties for the sole purpose of providing evidence to reopen the discovery process.

9. No party in this proceeding has made any allegations or submitted testimony that would make the fax relevant and create necessity for access by in-house counsel. CUB/CCSAO note that if the company is concerned by the allegations to date, it can take the necessary steps to review the accuracy of its testimony without the fax.

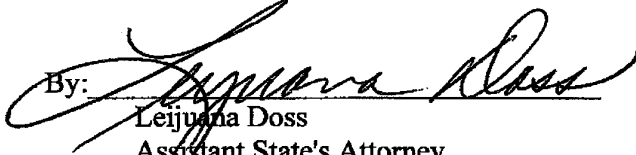
10. Intervenors may or may not submit testimony after reviewing discovery submitted by Nicor. If CUB/CCSAO eventually submit testimony, then the company may argue that it is entitled to all relevant material, and then the issue of whether the document is discoverable is ripe. However, even when its ripe, if CUB/Cook County witness Mierzwa submits testimony based solely on discovery, not the document itself, the issue is not so clear-cut. Moreover, if CUB/CCSAO submits testimony from a witness other than Mr. Mierzwa, who has never seen the fax, CUB/CCSAO would argue that the document is not relevant.

CONCLUSION

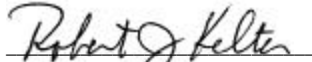
Based on the foregoing argument, CUB/CCSAO respectfully requests that the Commission overrule the ALJ's decision and deny Nicor's in-house counsel access to the fax at issue.

Respectfully Submitted,

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